Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Preserving the Open Internet	)	GN Docket No. 09-191
	)	
Broadband Industry Practices	)	WC Docket No. 07-52

COMMENTS OF THE NEW JERSEY DIVISION OF RATE COUNSEL

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EXECUTIVE SUMMARY

The Federal Communications Commission ("FCC" or "Commission") released a Notice of Proposed Rulemaking ("NPRM"),[1] in which it seeks comment on draft rules designed to preserve an open Internet. The proposed rules balance reasonably the goal of protecting the openness of the Internet with simultaneously encouraging flexible growth and innovation with respect to the uses of the Internet. The Commission has sufficient regulatory authority, in concert with state regulators, to promulgate and enforce the proposed rules and to protect consumers. The Commission should reject arguments that the rules will stifle deployment, competition, or innovation. Indeed, the current cable-telecommunications duopoly in the provision of broadband Internet access requires the use of safeguards to ensure that the gatekeepers of the Internet do not discriminate with respect to content and applications.[2] The Commission should also require broadband Internet providers to submit data as necessary for the Commission to determine whether the rates, terms and conditions of broadband Internet access services are just and reasonable.

Clear procedural rules and a timely complaint process are essential elements of the Commission's policy of preserving an open Internet. General principles and ad hoc enforcement cannot substitute for clear rules and consequences for discouraging discriminatory practices. Competition in the provision of broadband Internet access to the end user (which, in Rate Counsel's view, does not exist) *does not protect* the user from the effects of service providers

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[1] / In the Matter of Preserving the Open Internet, GN Docket No. 09-191, Broadband Industry Practices, WC Docket No. 07-52, *Notice of Proposed Rulemaking*, released October 22, 2009 ("NPRM").

[2] / The Accounting Safeguards and Non-Accounting Safeguards proceedings provide useful models to guide the establishment of safeguards for consumers' Internet access. In the Matter of the Implementation of the Telecommunication Act of 1996, Accounting Safeguards under the Telecommunications Act of 1996, FCC CC Docket No. 96-150, *Report and Order*, rel. December 24, 1996; *First Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 96-149, released December 24, 1996.

choosing which content to favor or disfavor. The arguments for open Internet policies stand independent of the level of competition for broadband Internet access.

Rate Counsel recognizes that broadband Internet providers must manage network congestion. However, acceptable network management practices must be clearly defined, transparent, and fully disclosed to consumers, regulators, and content and application providers. Transparency and disclosure requirements are not overly burdensome to the industry and are vital components of consumer protection efforts. In accordance with the goal of technological neutrality and regulatory parity, the principles and rules preserving an open Internet adopted by the Commission should apply to all broadband Internet providers.

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I. INTRODUCTION

The Federal Communications Commission ("FCC" or "Commission") seeks public input in response to its Notice of Proposed Rulemaking ("NPRM") regarding draft rules that it has proposed to preserve an open Internet.[3] During the past five years, Rate Counsel has been participating in various Commission proceedings that affect broadband industry practices,[4] and welcomes the opportunity to participate in this proceeding, which could lead to more effective protection of an open network. The NPRM comprehensively identifies and analyzes various aspects concerning the status of consumers' access to and use of the Internet in the United States, and proposes specific reasonable ways to ensure that innovation and an open network can continue to flourish. New Jersey Division of Rate Counsel ("Rate Counsel") commends the

3 / In the Matter of Preserving the Open Internet, GN Docket No. 09-191, Broadband Industry Practices, WC Docket No. 07-52, *Notice of Proposed Rulemaking*, released October 22, 2009 ("NPRM").

4 / See, e.g., Rate Counsel comments in A National Broadband Plan for Our Future, GN Docket No. 09-51, June 8, 2009 (see especially pages 54-64); Rate Counsel comments in WC Docket No. 07-52, June 15, 2007; July 16, 2007; February 28, 2008. Rate Counsel raised concerns about the impact of increasing market concentration on broadband industry practices in comments submitted in several FCC proceedings regarding mergers among major carriers in the telecommunications industry. *See, e.g.*, comments submitted by Rate Counsel in 2005 in WC Docket No. 05-75 (regarding the Verizon/MCI merger), in 2005 in WC Docket No. 05-65 (regarding the SBC/AT&T merger), and in 2006 in WC Docket No. 06-74 (regarding the AT&T/BellSouth merger).

Commission for its well-reasoned approach to designing fair and efficient rules to govern network management practices.

In these initial comments, Rate Counsel only addresses those questions that the NPRM poses that affect ratepayers. Rate Counsel also recognizes that diverse stakeholders may submit voluminous filings.

Rate Counsel is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. Rate Counsel participates actively in relevant Federal and state administrative and judicial proceedings. The above-captioned proceeding is germane to Rate Counsel's continued participation and interest in implementation of the Telecommunications Act of 1996.[5] The New Jersey Legislature has declared that it is the policy of the State to provide diversity in the supply of telecommunications services, and it has found that competition will "promote efficiency, reduce regulatory delay, and foster productivity and innovation" and "produce a wider selection of services at competitive market-based prices."[6] The FCC's decisions regarding broadband service and broadband industry practices will affect New Jersey's economy, welfare, and ability to compete in a global economy. New Jersey consumers' ability to participate fully in today's information-dependent society, and to obtain broadband services at reasonable rates and service quality is of paramount interest to Rate Counsel.

The outcome of this proceeding has sweeping and long-term consequences for New Jersey consumers. The way in which broadband providers manage access to and use of the

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5/ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"). The 1996 Act amended the Communications Act of 1934. Hereinafter, the Communications Act of 1934, as amended by the 1996 Act, will be referred to as "the 1996 Act," or "the Act," and all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code.

6/ N.J.S.A. 48:2-21.16(a)(4) and 48:2-21.16(b)(1) and (3).

Internet directly affects the level of openness that households and businesses located in New Jersey experience as they rely on a daily basis on the Internet for commerce, health, education, civic participation, and numerous other activities, as well as those New Jersey citizens and businesses who innovate at the "edge" of the network.

II. SCOPE OF PROCEEDING

The FCC indicates that it seeks comment "on the best means of preserving a free and open Internet, however it is accessed, and draft proposals to achieve that end."[7] The FCC seeks comment on, among other issues, the following:

- Draft language codifying the four principles the Commission outlined in the *Internet Policy Statement.*[8]
- Draft language codifying a fifth principle "that would require a broadband Internet access service provider to treat lawful content, applications, and services in a nondiscriminatory manner."
- Draft language codifying a sixth principle "that would require a broadband Internet access service provider to disclose such information concerning network management and other practices as is reasonably required for users and content, application, and service providers to enjoy the protections specified in this rulemaking."
- Draft language that, as described by the FCC would:

  > [M]ake clear that the principles would be subject to reasonable network management and would not supersede any obligation a broadband Internet access service provider may have—or limit its ability—to deliver emergency communications or to address the needs of law enforcement, public safety, or national or homeland security authorities, consistent with applicable law. The draft rules would not prohibit broadband Internet

[7] / NPRM, at para. 16.

[8] / In 2005, the Commission issued a Policy Statement, which propounded four principles to guide broadband regulation: (1) To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to access the lawful Internet content of their choice; (2) To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement; (3) To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to connect their choice of legal devices that do not harm the network; and (4) To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet, consumers are entitled to competition among network providers, application and service providers, and content providers. Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, FCC 05-151, Policy Statement, 20 FCC Rcd 14986 (2005), at Rcd 14988 ("Internet Policy Statement"), at para. 4.

> access service providers from taking reasonable action to prevent the transfer of unlawful content, such as the unlawful distribution of copyrighted works. Nor would the draft rules be intended to prevent a provider of broadband Internet access service from complying with other laws.

- The creation of a category of "managed" or "specialized" services, the definition of those services, and any rules that should be applied to those services.
- Whether the principles (as codified) should apply to non-wireline forms of Internet access, including, but not limited to, terrestrial mobile wireless, unlicensed wireless, licensed fixed wireless, and satellite.
- Enforcement procedures to ensure compliance with the codified principles proposed.[9]

Rate Counsel concurs with Chairman Genachowski's assessment of the importance of the issues under investigation in this proceeding:

> The heart of the problem is that, taken together, we face the dangerous combination of an uncertain legal framework with ongoing as well as emerging challenges to a free and open Internet. Given the potentially huge consequences of having the open Internet diminished through inaction, the time is now to move forward with consideration of fair and reasonable rules of the road, rules that would be enforceable and implemented on a case-by-case basis. Indeed, it would be a serious failure of responsibility not to consider such rules, for that would be gambling with the most important technological innovation of our time.[10]

III. COMMENT

The proposed rules are reasonable and entirely compatible with the continuing evolution of an innovative Internet and associated applications.

Rate Counsel commends the Commission for balancing reasonably the goal of drafting rules to protect the openness of the Internet while simultaneously encouraging flexible growth and use of the Internet. The rules are not heavy-handed but rather provide a reasonable road map to guide industry practices. As drafted, the rules likely will endure and apply for many years to come, but Rate Counsel also welcomes the Commission's periodic review of the rules to ensure that the rules keep pace with technological and market developments.

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9 / NPRM, at para. 16.

10 / *Id.*, Statement of Chairman Julius Genachowski, at 91.

The Commission's NPRM provides reasonable "rules of the road" that, if adopted, would not thwart innovation at "the edge" or in the "middle." Instead the NPRM appropriately recognizes that the economic incentives of broadband providers may not always coincide with consumers and with innovators that rely on an open network. Furthermore, industry threats to withhold investment in the face of government oversight should be rejected. Rate Counsel commends the Commission for the thoroughness of the NPRM and for the Commission's efforts to encourage open and constructive debate.

The Commission correctly asserts sufficient jurisdiction to adopt and enforce its proposed rules.

The Commission has invited comment on its position that it has "jurisdiction over broadband Internet access service sufficient to adopt and enforce the proposed rules."[11] The Supreme Court has recognized the Commission's jurisdiction to regulate Internet access providers.[12] As stated in the Commission's *Notice of Inquiry* in Docket No. 07-52:

- Broadband services are "wire communications" or "radio Communications," as defined by the Act.
- The Act gives the Commission jurisdiction over "all interstate and foreign communications by wire or radio."
- Section I of the Act imposes on the Commission the responsibility to ensure "a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." Included in this responsibility are the tasks: "to promote the continued development of the Internet"; "to preserve the vibrant and competitive market that presently exists for the Internet"; and "to encourage the deployment of technologies which maximize user control over what information is received by ... [users] of the Internet."[13]

[11] / *Id.*, at para. 87.

[12]/ In the Matter of Broadband Industry Practices, WC Docket No. 07-52, *Notice of Inquiry*, FCC 07-31 (rel. April 16, 2007), at para. 4.

[13]/ *Id.*, at paras. 4-7; 47 U.S.C. Sections 153(33), (52), 152(a), and 230.

Rate Counsel recommends that the Commission exercise its regulatory authority, in collaboration with states (consistent with the dual roles contemplated by Section 706 of the 1996 Act) to promote the continuing development of the Internet in a manner that benefits all consumers.[14] Furthermore, Rate Counsel recommends that the Commission dispel any lingering uncertainty about state and federal oversight of broadband services.

The FCC should view critically spurious industry threats to withhold investment in the wake of government intervention.

Rate Counsel anticipates that some comments filed by or on behalf of industry members may seek to discourage government oversight of broadband industry practices, and, in so doing, may seek to persuade the Commission that rules could inhibit capital investment. Rate Counsel urges the Commission to dismiss such arguments. Regional Bell operating companies ("Bells" or "RBOCs") throughout the country used precisely this line of argument during the 1990s and early 2000s to obtain regulatory freedoms in exchange for unenforceable and rarely fulfilled promises to deploy state-of-the-art technology.[15] A more rational regulatory future will reject any potential infrastructure scare tactics and will not barter away consumer protections for phantom promises.

Rate Counsel also urges the Commission to recognize the link between the status of the nation's on-ramp to the Internet (which is neither sufficiently broad nor sufficiently ubiquitous)

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14 / *See also* In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications Broadband Industry Practices Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management", File No. EB-08-IH-1518, WC Docket No. 07-52, *Memorandum Opinion and Order*, rel. August 20, 2008 ("Comcast Network Management Practices Order"), at paras. 14-27.

15 / For example, in 1992, New Jersey Bell's (now Verizon NJ) original petition for an alternative form of regulation indicated that "the plan would enable NJ Bell to invest in the accelerated deployment of advanced switching and transmission technologies for its communications network." *In the Matter of the Application of New Jersey Bell Telephone Company for Approval of Its Plan for an Alternative Form of Regulation*, Docket No. T092030358, May 6, 1993, at 1. The Board approved New Jersey Bell's plan, with modification, "conditioned upon a commitment by NJ Bell to achieve ONJ [Opportunity New Jersey] in its entirety, including full broadband capability by the year 2010." *Id.*, at 97. ONJ remains incomplete.

and industry's proclaimed needs to "manage" traffic over the network. Broadband deployment will minimize congestion, and the ensuing need to "manage" traffic. By contrast, efforts to introduce "premium" or preferential categories of traffic could be used to justify higher prices or lower service quality for consumers and to discourage investment in additional capacity (which could prevent congestion). Also, by reducing interstate special access rates to levels that exclude supracompetitive profits, the FCC can stimulate competition in the broadband supply, which may also reduce the incentive for anticompetitive broadband industry practices.

The duopoly that controls consumers' access to the Internet raises the potential and incentive for anticompetitive conduct.

Rate Counsel has previously raised concerns about the cable-telecommunications duopoly, whereby individual geographic markets are dominated by the incumbent cable company (which is typically affiliated with a behemoth corporate holding company) and the incumbent telecommunications company (similarly often affiliated with a behemoth corporate holding company). This duopoly acts as a gatekeeper, controlling the "pipes" over which consumers obtain their access to the Internet. Internet access directly affects consumers' ability to engage in free speech, control the way in which they obtain information, and participate in the 21st century information-based economy. Therefore, it is critically important the FCC increase and then sustain its regulatory oversight of the way in which broadband providers control access to and use of the Internet, particularly because the same companies that provide access to the Internet also have affiliates that provide applications over the Internet. This dual role creates compelling economic incentives for anticompetitive conduct. Because the economic incentive for companies to discriminate in favor of their affiliates and against their affiliates' competitors is strong, Rate Counsel urges non-structural safeguards, whereby companies must maintain separate books and records for transmission from those operations relating to retail offerings.

The provision of content must be separated from the provision of broadband Internet access service, at a minimum through non-structural safeguards (such as separate records, bookkeeping, and tariffs).[16] The Commission aptly recognizes the potentially adverse impact of market-distorting situations "[w]here broadband Internet access service providers have market power and are vertically integrated or affiliated with content, application, or service providers" which may raise "additional concerns."[17] The gatekeeper function should not be used to create anticompetitive barriers to content and applications provided by entities other than the broadband Internet access service providers' own affiliates.

Industry should be required to demonstrate how they intend to prevent such anticompetitive behavior. Otherwise consumers suffer through either higher prices or lower service quality for non-affiliated content, and suffer more generally through thwarted innovation and competition in the applications and content offered over the Internet.[18]

Furthermore, as the Commission recognizes, even if theoretically there were competition in the supply of broadband access (which, in Rate Counsel's view, does not exist), once a consumer has selected a broadband provider, the consumer could not then migrate frequently and easily among suppliers, and therefore is hostage to the practices of the supplier (see discussion of transaction costs below).

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16 / *See, e.g.*, 47 C.F.R. §64.1903.

17 / NPRM, at para. 72. See, generally, *id.*, at paras. 70-74.

18 / The FCC held a workshop to examine "how the Internet's openness affects the ability of network operators, Internet content and application providers, and other Internet technology developers to innovate and to drive investment, job creation, and economic growth throughout the Internet ecosystem" on January 13, 2009. FCC News Release, January 6, 2010.

The Commission has a long history of establishing safeguards against anticompetitive conduct, some of which may be instructive for this proceeding.

In its initial order in the "Accounting Safeguards" proceeding,[19] the FCC determined that its existing system of accounting safeguards found in Parts 32 and 64 of its rules satisfied the 1996 Act's accounting safeguard requirements *when a Bell used an affiliate to provide services.* The cost accounting safeguards consist of rules concerning affiliate transactions[20] and cost allocation.[21]

In its initial *Non-Accounting Safeguards Order*,[22] which governed Bells' entry into long-distance markets, the FCC addressed issues such as non-discrimination,[23] joint marketing,[24] and enforcement.[25] In interpreting the 1996 Act's mandate that the Bells operate their long distance operations affiliate independently, the FCC prohibited the joint ownership of transmission and switching facilities and the property on which they are located, but did not prohibit all joint ownership of property.[26] The FCC also determined that although a Bell and its section 272 affiliate were required to have separate officers, directors and employees (that is personnel could not be on the payrolls of the Bell and its affiliate), sharing of in-house personnel was allowed, provided that the transaction complied with the provisions of section 272(b)(5) regarding affiliate

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19 / In the Matter of the Implementation of the Telecommunication Act of 1996, Accounting Safeguards under the Telecommunications Act of 1996, FCC CC Docket No. 96-150, *Report and Order*, rel. December 24, 1996 ("Accounting Safeguards Order").

20 / 47 C.F.R. § 32.27.

21 / 47 C.F.R. §§ 64.901-904.

22 / *First Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 96-149, released December 24, 1996 ("Non-Accounting Safeguards Order"). These provisions generally prescribe the manner in which the BOCs may enter certain new markets, including the in-region interLATA services market and the prohibitions on the integration of the affiliate's interLATA network with the BOC. In its Second Order on Reconsideration, the Commission addressed section 272(e)(4) in greater depth (rel. June 24, 1997).

23 / *Id.*, at paras. 198-236.

24 / *Id.*, at paras. 272-297.

25 / *Id.*, at paras. 318-352.

26 / *Id.*, at paras. 159-162.

transactions.[27] The FCC determined that the Bell and its affiliate could provide marketing services for each other, provided that they were provided pursuant to an arm's length transaction.[28] The FCC also determined that section 272(b)(4) of the 1996 Act prohibited a Bell from co-signing a contract or other financial instrument with a section 272 affiliate "that would allow the affiliate to obtain credit in a manner that grants the creditor recourse to the BOC's assets in the event of default by the section 272 affiliate."[29] Among other things, the FCC reasoned as follows:

> These safeguards are intended both to protect subscribers to BOC monopoly services, such as local telephony, against the potential risk of having to pay costs incurred by the BOCs to enter competitive markets, such as interLATA services and equipment manufacturing, and to protect competition in those markets from the BOCs' ability to use their existing market power in local exchange services to obtain an anticompetitive advantage in those new markets the BOCs seek to enter.[30]

Many of the safeguards that the FCC established to govern Bells' entry into long distance markets provide useful models to guide the establishment of safeguards for consumers' Internet access. Furthermore, the FCC should impose ARMIS reporting on providers of voice, video and data services.[31] Specifically, the Commission should require broadband Internet access

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27 / *Id.*, at paras. 178-181.

28 / *Id.*, at para. 183.

29 / *Id.*, at para. 189.

30 / *Id.*, at para. 6.

31 / The FCC has asked for comments on whether ARMIS reporting should be extended to the entire industry. Service Quality, Customer Satisfaction, Infrastructure and Operating Data Gathering, WC Docket No. 08-190, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, FCC 08-203, September 6, 2008. Furthermore, there remains an outstanding Further Notice in Docket No. 07-38. In the Matter of Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership, WC Docket No. 07-38, *Report And Order And Further Notice Of Proposed Rulemaking*, rel. June 12, 2008 ("Form 477 Order"). In its *Form 477 Order*, the Commission significantly modified its broadband reporting requirements in ways that are, in many instances, consistent with the recommendations of Rate Counsel and other consumer advocates. These changes refine and expand current data collection efforts. In the incorporated Further Notice of Proposed Rulemaking ("FNPRM"), the Commission elicited comments on several related data gathering issues.

providers to file ARMIS reports 43-01, 43-05, 43-06 and other reports as necessary for the Commission to determine whether rates, terms and conditions of broadband Internet access services are just and reasonable and whether the returns from those services are just and reasonable.[32]

The Commission should establish an expeditious process for dispute resolution.

Because the rules necessarily cannot anticipate the various possible anticompetitive consequences of the intersection of evolving technology and market structure, particularly where gatekeepers' affiliates also provide applications, a timely complaint resolution process is essential. Innovation relies critically on an open Internet and lack of anticompetitive behavior. Incumbents possess greater resources to draw out the complaint process and therefore timely complaint resolution is essential.

Enforcement of the Internet principles should be through procedural rules that specifically govern complaints.

Chairman Genachowski stated in September 2009: "I will propose that the FCC evaluate alleged violations of the non-discrimination principle as they arise, on a case-by-case basis, recognizing that the Internet is an extraordinarily complex and dynamic system. This approach, within the framework I am proposing today, will allow the Commission to make reasoned, fact-based determinations based on the Internet before it—not based on the Internet of years past or guesses about how the Internet will evolve."[33] While the need for flexibility is certainly important, the need for procedural rules is paramount. The Commission is up to the task of

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[32] / Rate Counsel supported the extension of ARMIS service quality and infrastructure reporting to all carriers in WC Docket No. 08-190. *See* Service Quality, Customer Satisfaction, Infrastructure and Operating Data Gathering, WC Docket No. 08-190, Reply Comments of the New Jersey Division of Rate Counsel, December 12, 2008.

[33] / Prepared Remarks of Chairman Julius Genachowski, Federal Communications Commission, "Preserving a Free and Open Internet: A Platform for Innovation, Opportunity, and Prosperity," The Brooking Institution, Washington DC, September 21, 2009, at 5.

creating procedural rules that are sufficiently flexible and account for technological changes. The Commission cites its *Comcast Network Management Practices Order*[34] in its *NPRM*.[35] The Comcast decision aptly demonstrates the need for procedural rules. The Commission cannot continue to rely on case-by-case resolution of issues only after a lengthy process of petition, comments, ex partes and the issuance of an order. The original petitions were filed in November 2007.[36] An Order was released at the end of August, 2008 and even then Comcast was simply ordered to disclose its practices within 30 days but was given until the end of 2008 to stop the unreasonable network management practices.[37] The Commission's Enforcement Bureau must have better tools to deal with complaints regarding network management practices. The Commission should, at a minimum, adopt procedural rules to govern complaints of alleged violations of the codified Internet principles.[38]

On April 22, 2008, the Senate Commerce, Science, and Transportation Committee held a hearing on network management, during which lawmakers and then FCC Chairman Martin expressed diverse views on the need for legislation. As reported by *TR Daily:* "Senator Kerry said 'It seems to me we ought to able to skin this cat' by making clear what's allowed and what's not allowed. 'You want to have a situation where you don't have to have an advocacy group that brings it to your attention and screams about it and months go by.' He added to Committee Chairman Daniel K. Inouye (D., Hawaii) that he would like to see the committee 'find a way to

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[34] / In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications Broadband Industry Practices Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management", File No. EB-08-IH-1518, WC Docket No. 07-52, *Memorandum Opinion and Order*, rel. August 20, 2008 ("Comcast Network Management Practices Order").

[35] / NPRM, at para. 175.

[36] / *Comcast Network Management Practices Order*, at para. 11.

[37] / *Id.*, at para. 1. Comcast subsequently filed suit against the Commission and the case is pending in the Federal court. *Comcast Corporation v. FCC*, No. 08-1291 (D.C. Cir. Sept. 4, 2008).

[38] / NPRM, at para. 176.

provide that clarity and certainty in the marketplace.'"[39] Rate Counsel, in conjunction with National Association of State Utility Consumer Advocates ("NASUCA") wrote in its comments regarding the National Broadband Plan, " . . . bright-line, easily understood, and easily enforced rules are needed, with clearly defined consequences that will deter discriminatory behavior. Experience has taught [us] that the same carriers that now say that general principles and post-hoc enforcement are adequate will be the first to argue, when served with a complaint for misconduct, that the rules were not sufficiently clear a priori."[40]

State regulators should participate in enforcing consumer protection requirements.

The 1996 Act authorized states to promote broadband, recognizing that broadband or advanced services are critical to the future of our nation. Pursuant to the 1996 Act, "the Commission and each State commission . . . shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[41] This broad congressional mandate establishes a state role in broadband consumer protection.

The Commission should only allow network discrimination in narrow, well-defined situations based on a clear showing of need for such discrimination.

Rate Counsel understands that discrimination is not necessarily anti-competitive, and that there may be situations where preferential treatment of certain categories of traffic is in the

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39 / *TR Daily*, April 22, 2008.

40 / In the Matter of A National Broadband Plan for our Future, GN Docket No. 09-51, Reply Comments of the National Association of State Utility Consumer Advocates and the New Jersey Division of Rate Counsel, July 21, 2009, at 33, citing *See, e.g., Pacific Bell Wireless v. CPUC,* 140 C.A.4th 718, 750 (2006) (arguing that the due process rights of this wireless carrier, now an AT&T affiliate, were violated by enforcement of vague and ambiguous law). See, also, *Comcast Corporation v. FCC*, No. 08-1291 (D.C. Cir. Sept. 4, 2008).

41 / 1996 Act, Section 254(k).

public interest. However Rate Counsel urges caution in this regard and believes that such categories should be narrow and extremely well-defined (such as public safety). The fundamental shortcoming in any scheme that would permit network discrimination (preferential treatment for certain categories of applications) is that the judgment about such discrimination would reside with those companies that control access to the Internet. The incentives of such providers do not necessarily coincide with consumers, and allowing them to make such determinations creates unwarranted opportunities for anticompetitive behavior.[42] Therefore what may in theory sound attractive, in practice could create substantial anti-consumer fall-out.

Consumers rather than providers should be making such a determination. Well-explained, user-based congestion management coupled with limits on volume would be preferable to limits based on content or application. The latter would create inappropriate incentives for broadband service providers to discriminate against non-affiliates' applications.

The Commission seeks comment on discrimination and network management. Rate Counsel recognizes the potential need to carve out specific applications that merit preferential treatment such as telemedicine but cautions against the "slippery slope" of allowing those who control broadband access also to control which applications merit preferential treatment. The Commission has expressed its inclination to refine its policy through case-by-case measures. In this same vein, those seeking to engage in specific network management should petition the Commission, with the burden of proof on those petitioning to demonstrate the justification for such network management. If the entities controlling consumers' access to the Internet did not also provide content or have affiliates that provide content over the Internet, Rate Counsel's concern would not be as great. But as the structure of markets exists today in the United States,

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[42] / See discussion: M. Chris Riley, Free Press, Robb Topolski, New America Foundation, Open Technology Initiative, November 2009.

a broadband service provider could discriminate in favor of its affiliate's content. Also inspecting packets (through deep packet inspection) could exacerbate congestion (that is the situation resulting from a router receiving packets faster than the router can forward them). Instead of applications-based discrimination, which would create unnecessary opportunities for anti-competitive discrimination, providers should simply "throttle" traffic when absolutely necessary to do so and should make such policies and procedures transparent to users.

Furthermore, applications-based discrimination would ratchet up complex efforts to dodge the discrimination. Rate Counsel also cautions against "solutions" for network management that involve metered pricing or tiered pricing.[43] Rate Counsel acknowledges that if a few use the vast majority of the capacity, there should be some repercussion but for the vast majority, usage-based pricing is undesirable.

Effects of competition on open Internet policy.

Recognizing that the arguments for open Internet policies may be incomplete, the Commission asks

> [t]o what extent are particular arguments independent of competitive conclusions regarding particular markets for broadband Internet access services? Even in effectively competitive markets for broadband Internet access service, what impact do switching costs and consumer lock-in effects have on broadband Internet access service providers' ability to act in ways that limit innovation in content, applications, and services and/or reduce overall welfare?[44]

[43] / Rate Counsel opposes mechanisms that would enable the industry to "condition" consumers to pay for the use of the Internet. See, for example, transcript from January 6, 2010. Ivan Seidenberg stated, among other things (regarding wireless service); "The key for us is to get out in front of the architecture issues, the distribution issues, and to make sure that the market – the customer is conditioned correctly to pay for the value of that. That's been the biggest difficulty there. But I think that's happening." See also his statement: "It's very interesting. All of you know this. You can walk around Hong Kong and you could make a free call walking into any store, but people still make calls on their mobile device and pay whatever they pay. So what I'm getting at is I think they have a chance, if the industry uses good adult supervision on this, as to condition the market a lot better than we did by allowing the landline business to become almost marginally free for voice." Thompson StreetEvents, VZ - Verizon at Citi Global Entertainment, Media, and Telecommunications Conference, January 6, 2010.

[44] / NPRM, at para 81.

The necessity of open Internet policies transcends the level of competition in the provision of Internet access. To understand why the level of competition is irrelevant, consider the choice of broadband Internet access available to many, but not all, Americans. Where Americans have a choice of broadband Internet service providers, it is often the choice between two alternatives - the local ILEC and the local cable company. Without a deliberate, well-constructed open Internet policy, each of these service providers has the incentive and the ability to restrict the content or services available over its infrastructure. Under this scenario, the ILEC and cable company would each offer users only a subset of what the Internet has to offer, with this subset composed of those content providers willing and able to pay for access to end-users. Without net neutrality, more competition in the provision of Internet service access could actually lead to partitioning of the Internet, with each access provider determining what content is available on its "internet." The Commission must recognize that competition in Internet access to the end user *does not protect* the user from the effects of service providers choosing which content to favor or disfavor. The arguments for open Internet policies stand independent of the level of competition for broadband Internet access.

Without open Internet policies, and even *with* adequate competition in the provision of broadband Internet access, consumers could face the task of choosing among multiple "internets." Some would argue that consumers unhappy with the content choices available from one service provider would be able to choose another service provider. Even if this is so, the Commission points out that the costs related to switching providers may reduce consumer welfare.

Switching, or transaction, costs exist in the market for almost any service. Some transaction costs are natural consequences of the services in question. For example, the cost to a consumer of leaving one bank and becoming the customer of another includes filing paperwork to open the new account and close the old account, buying new checks, waiting for a new ATM card to become available, changing automatic bill-paying and direct-deposit information, etc. None of these costs are necessarily indicative of anticompetitive behavior on the part of banks, but rather are "natural" switching costs.

Common switching costs relevant to the provision of Internet access include the requirement that a customer purchase (and pay shipping on) specific equipment when initiating service, or return that equipment when service is terminated. Some Internet access providers make email addresses available to customers. When service terminates, customers lose access to these email addresses (because the domain name is typically associated with the service provider), forcing customers to give friends, relatives, and business associates a new email address. Even when there are choices among providers, the consumer is constrained in exercising choice by these transaction costs in time and money. Provider "lock-in" policies, such as a requirement to sign a one- or two-year contract, reduce the ability of consumers to benefit from competition when it arises.

Although switching/transaction costs and lock-in policies hinder the development of competition in the provision of Internet access, with well-constructed open Internet policies, in which each Internet access provider must deliver any lawful content demanded by the consumers, switching costs and lock-in policies should have no effect on the provision of content, applications, and services available over the Internet.

The Commission also seeks input about its analysis of competition in the market for broadband services:

> To the extent that certain arguments do depend upon the particular competitive state of a market, how should the Commission define and

> evaluate such markets? What specific evidence is there regarding the competitive state of those markets? We also seek comment on whether and to what extent application of the generally applicable antitrust laws is sufficient to address the concerns we identify here.[45]

Rate Counsel applauds the great strides the Commission has recently made in differentiating among tiers of broadband service for reporting purposes.[46] This differentiation, along with a granular geographic approach to analysis, allows the Commission to survey the competitive landscape for broadband Internet access.

Along with these two aspects of Internet access, the Commission should also consider the cost of services when analyzing competition in the broadband access market. For example, a "triple-play" service offering costing over $100 per month should not be considered as a product competing with stand-alone broadband service at $25 per month. For a low-income consumer, the $25 per month service may be within reach, while the more expensive service may not. In this case, it is hardly reasonable to consider the $100 package as a practical competitive alternative.

Importance of the Commission's Fourth Principle

The Commission seeks comment on whether the fourth principle (the "competitive option" principle) is necessary, or is it made redundant by the first three principles?[47] The fourth principle states

> *Subject to reasonable network management, a provider of broadband Internet access service may not deprive any of its users of the user's entitlement to competition among network providers, application providers, service providers, and content providers.*

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45 / *Id.*

46 / Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership, WC Docket No. 07-38, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 08-89 (rel. June 12, 2008).

47 / NPRM, at para. 102

Although there is some overlap with the first three principles (regarding content, applications, and devices), the fourth principle is important because it makes explicit that broadband service providers may not hinder *competition*. This principle should be seen as a safeguard preventing service providers from limiting how consumers use the Internet while still complying with the letter of the first three principles. The fourth principle prevents Internet access providers from gaining control over all "lawful applications" of a certain type.

Transparency regarding traffic management practices in essential.

Rate Counsel commends the Commission for proposing to adopt a sixth principle of transparency and to codify that principle.[48] The Commission is correct that such a principle will "protect and empower consumers and [] maximize the efficient operation of relevant markets by ensuring that all interested parties have access to necessary information about the traffic management practices of networks."[49] The adoption of rules regarding transparency and disclosure should not be controversial. As noted by the Commission, commenters on the National Broadband Plan "generally agreed" that providers should be required to disclose additional information about network management practices than they currently disclose.[50] A competitive market cannot function without complete information and consumers cannot make adequate decisions without information about a providers network management practices. Rate Counsel has recommended,[51] and continues to recommend, that broadband providers be required to disclose customer-usage restrictions and that those disclosures be written in plain language

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48 / *Id.*, at para. 118.

49 / *Id.*

50 / *Id.*, at para. 122.

51 / See, e.g., In the Matter of Broadband Industry Practices, FCC WC Docket No. 07-52, Reply Comments of the New Jersey Division of Rate Counsel, February 28, 2008, at 10.

and disclosed prominently (*i.e.* at the point of sale; in bill inserts at periodic intervals; and on providers' websites). As stated previously:

> Consumers should be able to know the limits of the services they purchase, and should be alerted if they mistakenly cross the threshold into 'excessive use.' Simply delaying packets or resetting connections when consumers' use is 'excessive' without explanation is insufficient: Consumers do not have the benefit of seeing the effects of their activities on the network, and might easily confuse network management policies designed to curb congestion for poor quality services or applications. ISPs could educate consumers better about their rights and obligations.[52]

Consumer protection and disclosure has been, and continues to be,[53] an important tenet of telecommunications regulation and there is no reason why such values shouldn't also apply to new technologies.

Rate Counsel is pleased that the Commission is holding an open internet workshop: "Consumers, Transparency, and the Open Internet," and looks forward to reviewing the ideas put forth therein.[54] As an initial matter, Rate Counsel supports the adoption of a standard format. Consumers must be able to make comparisons across providers. Certainly a good example is New America Foundation's proposed Broadband Truth-in-Labeling proposal.[55]

The Commission expresses concern that it must adopt a transparency rule that is "minimally invasive" to minimize the burdens on broadband Internet access service providers.[56] However, these companies should have policies already in place regarding network management

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52 / In the Matter of Broadband Industry Practices, FCC WC Docket No. 07-52, Reply Comments of the New Jersey Division of Rate Counsel, February 28, 2008, at 11. The ISP should have in place clear guidelines detailing what users can expect in terms of downloading and uploading capabilities. The ISP should provide clear guidance as to what particular Internet protocols and types of applications may be deprioritized in order to maintain network integrity.

53 / See, e.g., Consumer Information and Disclosure; Truth-in-Billing and Billing Format; IP-Enabled Services, CG Docket No. 09-158, CC Docket No. 98-170, WC Docket No. 04-36, Notice of Inquiry, rel. August 28, 2009.

54 / The workshop is scheduled for January 19, 2010 after the filing on initial comments. See: http://www.openinternet.gov/workshops/consumers-transparency-and-the-open-internet.html.

55 / http://oti.newamerica.net/publications/policy/broadband_truth_in_labeling.

56 / NPRM, at para. 118.

practices. In order for the practices to be non-discriminatory, network engineers must follow procedures that are clearly defined and thus already written down and updated as needed. Though such management practices must be "translated" into layman terms, this is likely to happen internally at most corporations as a courtesy to less tech-savvy employees already (i.e. marketing and public policy departments). For example, there is nothing burdensome about disclosing thresholds that will trigger any limits on customers' access to bandwidth. There should already be an internal policy in place. And, if such a threshold changes, that can be reflected on a provider's website quite easily.[57] Disclosures to consumers should be explicit, easy to understand, and highly visible. Relegating these important disclosures to fine print on the back of the last page of a service agreement would negate their utility. Rather, disclosures could and should become a part of the description of the product itself.

Disclosure requirements should explain clearly to consumers any limitations on the service they are purchasing.

The Commission also seeks comment

> . . .more narrowly on the kind of required disclosures to users that would effectuate the Internet principles discussed herein. Specifically, we propose that broadband Internet access service providers should be required to disclose information to users concerning network management and other practices that may reasonably affect the ability of users to use the devices, send or receive the content, use the services, run the applications, and enjoy the competitive offerings of their choice.[58]

and

> We seek comment on what consumers need to know about network management practices to make informed purchasing decisions and to make informed use of the services they purchase. We believe that many consumers need information concerning actual (as opposed to advertised) transmission rates, capacity, and any network management practices that affect their quality of service. Commenters should address what types of network management practices could interfere with or restrict service and

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[57] / Disclosure of this threshold was required by the Commission in the recent Comcast case. Comcast Broadband Industry Practices Order.

[58] / NPRM, at para. 121.

> what types of disclosure would be appropriate. Should broadband Internet access service providers be required to disclose, for example, the times of day users are most likely to be affected by network congestion, or the steps providers might take to control or alleviate congestion? Disclosure of service information is vital to consumer choice both before and after a consumer decides to purchase a service. Thus, we seek comment on the types of information broadband Internet access service providers should be required to disclose to consumers before and after purchase.[59]

Before the issue of traffic management came to light, consumers had relatively few issues to consider in making choices about what Internet service provider to use. Assuming consumers had a choice, which was not always the case, they typically chose between cable modem service and DSL service. Each type of service had its own pricing, speed, and congestion characteristics. In the face of traffic management policies, however, consumers will need more information. First, consumers will require a clear explanation in lay-man's terms of the problem at hand, *i.e.*, why traffic management policies are necessary at all. This will provide a context for the policies being explained. Second, consumers will require a range of potential avenues that service providers might pursue in order to manage traffic, along with consumer-oriented examples of the potential effects of these policies. For example, if a service provider states that in order to manage congestion it will slow the delivery of packets, consumers will need to know how that will affect common applications, such as email, VoIP applications, use of YouTube, uploading large files, etc. Third, disclosures should explain steps that consumers can take to reduce congestion, or minimize the effect of traffic management policies on their own computing experience. An analysis of the times of day or days of the week when traffic is greatest and most susceptible to traffic management would allow users to avoid peak times. This information alone could help reduce traffic congestion by encouraging users to go online at off-peak hours.

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59 / *Id.*, at para. 125.

The format of disclosures to content, application, and service providers also should be clear.

The Commission also seeks comment on how content, application, and service providers should be informed about network management policies.[60] Just as end-user consumers need to understand the implications of traffic management policies in order to make informed decisions, so too do providers of Internet-based products and service require this important disclosure. In particular, providers of Internet-based products and services need to understand any network management policies that may affect the usability of their products and services. To this end, each provider of Internet-based products or services should be furnished with clear guidelines outlining the traffic management policies in force. As with consumer-directed disclosures, the disclosures directed toward service and product providers should explain specifically how service and product providers will be affected by the traffic management policies, and should outline step these service and product providers can take to minimize the impact of these policies on their services and products. Making the policies, effects of the policies, and preventative measures explicit could help minimize the need for implementation of more draconian traffic management policies.

Disclosure reporting.

The Commission seeks comment on what reporting should be required of broadband Internet access service providers.[61] The Commission should gather from broadband Internet access service providers the actual disclosures as made available to consumer and Internet-based service and product providers. The Commission should require access providers to submit new disclosures whenever policies are updated or modified. Access to the full range of traffic

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[60] / *Id.*, at para. 127.

[61] / *Id.*, at para. 128.

management policies in use will allow the Commission to monitor and study the effects of traffic management, and will contribute to its understanding of the status of broadband usage.[62]

General disclosure issues.

The Commission seeks comment on

> what events should trigger disclosure obligations, how these disclosures should be made and in what format, how often they should be made, and whether the disclosures should be uniform or tailored to specific purposes and audiences. Should broadband Internet access service providers be required to disclose any changes to their network management practices before or within a certain period of time after implementing those changes?[63]

The most obvious event that should trigger a disclosure is service initiation. The disclosure should be a prominent component of the description of the access service being provided. Other than initiation of service, further disclosure should be required whenever traffic management policies are modified by the access provider. Upon receipt of a new traffic management disclosure, consumers should be allowed the option of discontinuing subscription to the access service without penalty if she or he deems the new traffic management policy inappropriate or inadequate. Full disclosure of traffic management policies should be available at all times on the websites of Internet access providers.

The Commission also seeks comment on the usefulness of is disclosure of network management practices to users and content, application, and service providers, and more specifically, whether disclosure will enable users and/or content, application, and service providers to circumvent legitimate network management.[64] A properly-constructed disclosure

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62 / *See, also*, Rate Counsel's recommendations above regarding ARMIS reporting.

63 / NPRM, at para. 129.

64 / *Id.*, at para. 131.

will allow end-users and Internet-based content, application, and service providers to choose the method of Internet access that best meets their needs and expectations.

Rules preserving an open Internet should apply to all platforms that provide broadband Internet access.

The Commission states: "As our choices for accessing the Internet continue to increase, and as users connect to the Internet through different technologies, the principles we propose today seek to safeguard its openness for all users. We affirm that the six principles that we propose to codify today would apply to all platforms for broadband Internet access."[65] Yet, in the same paragraph, the Commission undermines this principle of technological neutrality by stating: "Nevertheless, we acknowledge that technological, market structure, consumer usage, and historical regulatory differences between different Internet access platforms may justify differences in how we apply the Internet openness principles to advance the goals of innovation, investment, research and development, competition, and consumer choice."[66] The principles adopted by the Commission should apply to non-wireline forms of Internet access such as terrestrial mobile wireless, fixed wireless, and satellite. The industry often seeks regulatory parity and "a level playing field." These principles should accomplish just that.

Chairman Genachowski acknowledged in a September speech that at least one provider has blocked access to political content.[67] As wireless broadband becomes more ubiquitous, the

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65 / *Id.*, at para. 154.

66 / *Id.*

67 / Prepared Remarks of Chairman Julius Genachowski, Federal Communications Commission, "Preserving a Free and Open Internet: A Platform for Innovation, Opportunity, and Prosperity," The Brooking Institution, Washington DC, September 21, 2009, at 3. He stated specifically: "Notwithstanding its unparalleled record of success, today the free and open Internet faces emerging and substantial challenges. We've already seen some clear examples of deviations from the Internet's historic openness. We have witnessed certain broadband providers unilaterally block access to VoIP applications (phone calls delivered over data networks) and implement technical measures that degrade the performance of peer-to-peer software distributing lawful content. We have even seen at least one service provider deny users access to political content. And as many members of the Internet community and key Congressional leaders have noted, there are compelling reasons to be concerned about the future of openness." This would appear to refer to Verizon Wireless' block of text messages from NARAL in 2007. See

Commission must ensure that the principles that consumers expect apply on all platforms. As noted by the Commission in its NPRM, "[m]obile wireless is now a key platform enabling consumers to access communications services."[68] Despite industry claims to the contrary, the wireless market is controlled by a few big players whose policies have a tremendous affect. The argument that the wireless industry is a burgeoning industry that needs special assistance or that the industry will cease investing in their networks is simply not credible given the highly profitable nature of the industry.

IV. CONCLUSION

Rate Counsel recommends that the Commission adopt rules that codify the six Internet principles it has articulated. The Commission's careful balance of establishing "rules of the road" without creating burdensome government intervention in a fast-evolving industry properly protects consumers' interests in preserving an open network while encouraging continuing innovation. Furthermore, Rate Counsel commends the Commission for furthering the goal of transparency in federal policy making through its proposal of specific rules, with clearly defined objectives.

Adam Liptak, "Verizon Blocks Message of Abortion Rights Group," The New York Times, September 27, 2007. The Commission has not ruled on a petition for declaratory ruling regarding the regulatory status of text messages filed in December, 2007 in Docket No. 08-7.

[68] / NPRM, at para. 158.

Respectfully submitted,

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